



UNITED STATES DEPARTMENT OF COMMERCE
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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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EXAMINER

SHERRER, C

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 03/15/00

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Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

Advisory ActionApplication No.
08/898,736Applicant(s)
Coppens et alExaminer
Curtis E. SherrerGroup Art Unit
1761

THE PERIOD FOR RESPONSE: [check only a) or b)]

- a) ☒ expires 4 months from the mailing date of the final rejection.
- b) ☐ expires either three months from the mailing date of the final rejection, or on the mailing date of this Advisory Action, whichever is later. In no event, however, will the statutory period for the response expire later than six months from the date of the final rejection.

Any extension of time must be obtained by filing a petition under 37 CFR 1.136(a), the proposed response and the appropriate fee. The date on which the response, the petition, and the fee have been filed is the date of the response and also the date for the purposes of determining the period of extension and the corresponding amount of the fee. Any extension fee pursuant to 37 CFR 1.17 will be calculated from the date of the originally set shortened statutory period for response or as set forth in b) above.

- ☐ Appellant's Brief is due two months from the date of the Notice of Appeal filed on _____ (or within any period for response set forth above, whichever is later). See 37 CFR 1.191(d) and 37 CFR 1.192(a).

Applicant's response to the final rejection, filed on Mar 9, 2000 has been considered with the following effect, but is NOT deemed to place the application in condition for allowance:

☒ The proposed amendment(s):

- ☐ will be entered upon filing of a Notice of Appeal and an Appeal Brief.
- ☒ will not be entered because:
- ☒ they raise new issues that would require further consideration and/or search. (See note below).
 - ☐ they raise the issue of new matter. (See note below).
 - ☒ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal.
 - ☐ they present additional claims without cancelling a corresponding number of finally rejected claims.

NOTE: The proposed amendments change the scope of the claims.

- ☐ Applicant's response has overcome the following rejection(s):

- ☐ Newly proposed or amended claims _____ would be allowable if submitted in a separate, timely filed amendment cancelling the non-allowable claims.

- ☒ The affidavit, exhibit or request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See attached.

- ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.

- ☒ For purposes of Appeal, the status of the claims is as follows (see attached written explanation, if any):

Claims allowed: None

Claims objected to: None

Claims rejected: 1, 3-9, 13-24, 27-31, 33 and 43-66, all the pending claims.

- ☐ The proposed drawing correction filed on _____ ☐ has ☐ has not been approved by the Examiner.
- ☐ Note the attached Information Disclosure Statement(s), PTO-1449, Paper No(s). _____
- ☐ Other

CURTIS E. SHERRER
PRIMARY EXAMINER
ART UNIT 1761

ADVISORY ACTION

Response to After Final Amendment

Applicants' arguments of 01/27/00 have been reviewed but not found to be persuasive. Specifically, Applicants first assert that the cited art (Gyllang et al) do not teach or suggest adding activated spores (as defined in Applicants' specification) to a cereal before or during the malting process and support this assertion with the Coppens Declaration (Paper #23). Said Declaration states that the spores were considered to be activated if they were "significantly more swollen than the dormant size, the size of the spores being increased by a factor preferably between 1.2 and 10 [times] over the dormant spore size and/or having one or more germ tubes per spore." The Declaration goes on to state that inactive spores for the three respective microorganisms were measured to be 5.0-8.0 microns, 4.0-5.0 microns, and 2.5-3.0 microns. Based on these numbers an activated spore would have a size of greater than 6 microns, 4.8 microns and 3 microns respectively. However, the Declaration states that to be considered an activated spore the size would have to be greater than 9.6 microns, 6 microns, and 3.6 microns, respectively. It appears that Declarant used the upper range of the inactive spore size to obtain their values. A reason for such a calculation is not given.

It is requested that, if another declaration is submitted, that the actual measurements, i.e., the raw data, be submitted so that the Examiner can clearly determine on his own whether activated spores as defined by Applicants are present in the process of the prior art.

Lastly, it is noted that the cited art states that, while “the actual number of spores is of less importance than other factors” it is “instead the conditions prevailing during the germination period which are decisive-conditions which permit the spores to grow and develop mycelium.” Clearly, the spores used in the Gyllang et al process are activated at some point.

It is noted at this point that the faxed Declaration was of such poor quality that the figures found on page 4 are unusable. Nevertheless, it is not considered that these figures would contain persuasive evidence so as to indicate that the claims are allowable.

Applicant states that even if activated spores are present in the process of the cited art, that said art teaches away from adding said spores because they are taught to cause gushing. Gyllang et al clearly state that *Rhizopus oryzae* “does not actually cause gushing” (page 247, top). It is true that the tested *Aspergillus* species do cause gushing but in view of the fact that the claims do not exclude these organisms, the assertion is not found to obviate the prior art rejections.

It is noted that the addition of *R. oryzae* spores, in some instances decreased the saccharification time by almost half, almost tripled the FAN, increased the color by 50%, and other significant improvements. The benefits would certainly be of importance to brewers and therefore there is clearly motivation to expand on the process of the prior art.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Curtis Sherrer whose telephone number is (703) 308-3847. The examiner can normally be reached on Tuesday through Friday from 6:30 to 4:30.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gabrielle Brouillette, can be reached on (703)-308-0756. The fax phone number for this Group is (703)-305-3602.

Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0651.

A handwritten signature in black ink, appearing to read "Curtis E. Sherrer", with a long horizontal flourish extending to the right.

Curtis E. Sherrer
March 13, 2000